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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 715.

In the Matter

of

The Petition of REDERI A/S HENNESEID, as Owner of the Motor Vessel AAKRE, in a cause of exoneration from or limitation of liability.

CHARLES I. WATERMAN, *et al.*,

Petitioners,

—against—

Motor Vessel AAKRE, REDERI A/S HENNESEID, LAMPORT & HOLT LINE, LTD., and CONTINENTAL GRAIN COMPANY,

Respondents.

BRIEF OF LAMPORT & HOLT LINE, LTD., IN OPPOSITION TO PETITION FOR CERTIORARI.

CHAUNCEY I. CLARK,
Proctor for Lamport & Holt Line, Ltd.

JOHN L. GALEY,
Of Counsel.

New York, Nov. 21, 1941.

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Neither the decision nor the language of the courts below intrenched upon or impaired the rule of *The Pennsylvania*, 19 Wall. 125. On the contrary, both courts below recognized the rule and found as a fact that, if there was any breach of the Norwegian regulations in the months before the stranding with respect to the entry in the compass book of observations as to compass deviation such breach could not have caused

or contributed to the stranding. It was so held after a trial lasting the better part of three weeks involving a variety of contentions by cargo. When both the District Court and the Circuit Court of Appeals have passed on a question of fact this court will not again examine the evidence to determine the correctness of the findings.

> *The Carib Prince*, 170 U. S. 655, 658;
> *The Wilderoft*, 201 U. S. 378;
> *La Bourgogne*, 210 U. S. 95, 114;
> *Bochmer* v. *Pennsylvania Railroad Company*, 252 U. S. 496.

Some review of the facts is however desirable in view of statements and implications in the petition and supporting brief which the record does not support.

The Circumstances of the Stranding.

The vessel sailed from St. John, New Brunswick, at about 9 p. m. on October 28, 1937, on a magnetic course (South 49° West) which allowing for local variation and an easterly deviation of 3°, was equivalent to 211° true. This course, if made good, would have taken the vessel safely out of the Bay (1387-8). But as the distance to the entrance was about 50 miles and the vessel in the meantime would be subject to the effect of wind and currents, this was only a starting course and the master intended to obtain his position by radio bearings or shore lights before passing out of the Bay (Oyan, 218, 219).*

* References are to pages unless otherwise indicated.

At 11:45 after the vessel had gone by her log some 26 miles (fol. 4185) she was stopped owing to breakdown of the engines; the log was taken in; and from that time until 2:50 a. m. the vessel was drifting in a fog without any facilities for measuring the actual effect of tide, current or wind.

At 1:45 a. m. the third officer reported to the master, who had retired, that he had seen and counted the flashes of a light on the easterly shore, bearing south-east by east ½ east and that they indicated Prim Point (222). When the master came to the bridge the light was shut out by fog or rain.

The supposed sighting of the light owing to the limited range of its visibility indicated that the vessel was then on the easterly side of the Bay. The master, therefore, immediately ordered the second officer to obtain the radio bearing from St. John.

Shore lights and radio bearings are the most reliable aids which navigators have in determining their position. Radio bearings, especially when passing entirely through water, are completely reliable (281, 290, 298). A bearing obtained after the vessel stranded passed directly through the ship (see 1392).

The second officer, as radio officer of the ship, had obtained hundreds of radio bearings for the master on previous occasions without a single known error (213). In this case, however, the second officer laid down the radio bearing received at 2:25 a. m. (364) with an error of about 20 to the eastward. The vessel was still drifting without power and the master considered that he was obliged to fix his position at a point at or near the intersection of the bearing from Prim Point light and the line of the radio bearing since the sighting and bearing of the light confirmed and was confirmed by the radio bearing.

At 2:50 a. m. the voyage was resumed on a course to the westward of the starting course. At 3:41 a. m. the master *made a further check* on the supposed double check he already had, by obtaining another radio bearing from St. John, which, as incorrectly plotted by the second officer on the chart, only confirmed the previous radio bearing. Ten minutes later a further cross bearing, which was correctly laid down on the chart, indicated that the vessel was in shoals on the easterly side of the Bay. To escape the danger, the master changed the course at 4 a. m. sharply to the westward and reduced his speed. At this time the vessel was in fact close to Grand Manan Island on the northerly side of the entrance to the Bay. Twenty minutes later she stranded.

The vessel in fact at all times, up to the time the engines broke down, as the Courts below found, was on the course indicated by her compass making proper allowance for a deviation of not exceeding 3° which was the deviation applicable to such course properly noted in the compass book from an observation taken on September 27, 1937, about a month before the stranding (1384, 1386, 1447). While under way she went right where it might have been supposed she would go on the basis of her heading by compass and her compass book except as affected by tide, current and wind.

The errors which resulted in the stranding had nothing to do whatever with any deficiencies in the compass records.

The Compass, the Records of Deviation and the Norwegian Decrees.

The petitioners first contended that the whole story of the ship's officers as to the courses pursued by the vessel could not be believed and in any event that the compasses were defective and that the vessel was not properly supplied with charts. These claims were rejected by the Trial Court. The failure of the officers on previous voyages to make notations in the compass book (as distinguished from the log book) of all their daily observations for deviation was the only basis left for claiming a shortcoming in the vessel's equipment. But this had no rational connection with the stranding. The petitioners attempt to fill in this hiatus by reliance on the Norwegian decrees and the rule in *The Pennsylvania.*

After a vessel is built or repaired and at other times when compass observations indicate that it is necessary, the compasses are tested by an expert who prepares a compass card showing the deviation on various headings. This constitutes the basic information with respect to the compass. From day to day, while the vessel is at sea, when weather conditions permit, observations are taken of heavenly bodies, usually the sun, to determine whether on the various courses which the vessel pursues there is a substantial departure from the deviation indicated on the compass card. All this was done on the "Aakre".

In 1926 and in 1932 the Norwegian Government issued certain regulations (1124, 1126) directed to ships' officers, prescribing how certain ships' records should be kept. The decree of 1932 provided, among other things, that when a ship of over 500 tons was

at sea "deviation examination must be made every day, when it can be done" and further prescribed that when such vessels were in foreign trade the entries with regard to the examinations should be made in a special compass and chronometer book "in accordance with the rules for entering in the book." A penalty was provided as against the officers (but not the owner) for failure to keep the records as required.

These decrees have no counterpart in the law of the United States or the law of Canada.

The petitioners, after referring to the regulations requiring daily observations when the weather permitted and the making of entries in the compass book, state in their petition that "the navigators of the 'Aakre' had made no attempt to comply with this statute." *This is a misstatement unless the findings of the courts below are to be completely disregarded.* Judge Woolsey held:

> "I believe the testimony of the ship's officers that the deviations noted on the compass card were checked by daily observations, many of which were recorded in the compass book; and I agree with the ship's counsel that the recording of all the identic observations of deviation would not add anything to the information of a person seeking to navigate the 'Aakre'" (p. 1385).

This finding was not disturbed on appeal. The Circuit Court of Appeals said:

> "The Court found however that adequate observations had been made and from the log book entries that the deviation in the southwest quadrant had never been greater than 3°" (p. 1447).

The only possible claim of noncompliance with the Norwegian regulations arises from the failure of the

officers to make entries in the compass book, as distinguished from the log, of *all* the daily observations for deviation. As to this the master testified that observed deviations which were the same as shown by the compass card were not all entered in the compass book though the deviations actually used on each watch as ascertained or checked by the daily observations appear in each day's entries of the log (208, 209).

The Norwegian decree of 1926 did not require the grouping of observations under compass points (p. 1125). The entries in the compass book of the "Aakre" were however grouped under the 36 different points of the compass. The log entries of compass observations were of course kept chronologically.

Naturally there are many long intervals between the dates of various entries in the compass book under each point or segment of the compass circle, as any single daily observation would be entered only under the compass point representing the course the vessel was then pursuing, and months might elapse between different times when the vessel was pursuing any particular course. Neither the Norwegian statute, however, nor good seamanship required that the compass book should contain frequently repeated observations on any one point of the compass. The fact, therefore, that there were gaps in the entries of the compass book for any point or segment is of no significance whatever.

All the courses of the vessel on the night of the accident lay in the S. W. quadrant. The courts below found that the daily observations over a period of a year and seven months before the stranding had not disclosed a single deviation in this quadrant of more than 3° (1447, 1385). The latest observation noted in the compass book applicable to the course from St.

John was made September 30, 1937, less than one month before the accident (Opinion C. C. A. 1447; Dist. Ct. 1384).

The Circuit Court of Appeals held expressly that the compass book "carried the particular entry necessary for the occasion" (1447).

The language of petitioner's brief also carries the implication that the compasses were not reliable and that the master accordingly had no confidence in the courses laid down by them. This also is contrary to the findings of the courts below. Judge Woolsey found as follows:

> "I find that they" (the compasses) "were of standard and satisfactory type, and that they had good directive force" (1382) * * *.
>
> "The deviations of the compasses were reduced practically to a minimum and the adjustment was, in the opinion of the petitioner's experts,—who inspired me with more confidence than the experts for cargo—an excellent piece of work. Indeed, there does not seem to have been any real criticism of any value in respect of this compensation, and I find that there was not any evidence from the observation at Sandefjord that there was any lack of balance or stability in the compasses.
>
> I find further, without any hesitation, that the compasses were good compasses and that they were properly adjusted on leaving Sandefjord" (1383).

The Circuit Court of Appeals said:

> "The compasses were shown to be accurate and reliable, the court found that they were, and the appellants have not even made out a serious case to the contrary" (1446).

> "On the contrary, it has already been stated that the compass was shown to be highly accurate * * *" (1449).

The District Court also found that the vessel was "well settled magnetically" (1384).

POINT I.

Both courts below, assuming the law to be as petitioner contended on all material points, decided the case on a pure question of fact.

Both courts held that if the Norwegian regulations required *all* deviation observations to be entered in the compass book the failure of the navigating officers to do so could not have caused or contributed to the stranding. Judge Woolsey said (1401-2):

> "I think it is unnecessary for me to discuss or decide the juridical status before this Court in this cause of the Norwegian Statutes relied on by cargo. Because, even if they have the effect on the burden of proof for which cargo contends, and make the so-called Pennsylvania rule applicable, this is one of the rare cases in which the shipowner has sustained the heavy burden of proof laid on it by that rule, and has shown that, if there was any breach of said Norwegian Statutes or Rules, such breach not only did not but could not, under the facts here shown, have caused or contributed to the 'Aakre's' stranding."

The Circuit Court of Appeals said (1450-1):

> "Still, if it were applied in the strongest sense conceivable, requiring the defaulting vessel to show that the inference of *non sequitur* was not

only the most probable, but even the only possible, inference from the facts in evidence, appellants still could not succeed; for every point at issue in the case, including the captain's faith in his compass, was established by direct testimony.

The questions involved in this proceeding were questions of fact which the court below resolved in an opinion which demonstrates the care and consideration which he gave to the matter. D. C. S. D. N. Y., 31 F. Supp. 8-23. In view of this, criticisms made of it that he was confused as to the navigator of the ship, because he did not always distinguish between the master and the second mate, seem rather captious. His material findings are clear and definite. We have recently emphasized that admiralty findings should be accepted on appeal unless clearly erroneous. *United States Gypsum Co.* v. *Conners Marine Co.*, 2 Cir., 119 F. 2d 689; [fol. 1454] *Johnson* v. *Andrus*, 2 Cir., 119 F. 2d 287; *McAllister Bros.* v. *Pennsylvania R. Co.*, 2 Cir., 118 F. 2d 45. Here they seem quite the most natural and rational under the circumstances; indeed, cargo's real complaint is with the policy of Canada and ourselves as to the merchant marine, which accords the water carrier full protection against the negligent navigation of its own servants. Robinson on Admiralty, 1939, 495-503."

These findings of fact completely dispose of the case unless *The Pennsylvania* rule means that once a violation of the statute or regulation is established there is liability for any subsequent loss or damage on the principle of *post hoc ergo propter hoc.*

In reaching their decision both courts below assumed *arguendo* every issue of law or statutory interpretation in favor of the cargo.

They assumed (1) that a breach of the Norwegian regulations as to the keeping of records would have the same effect as the breach, at the time of an accident, of a statutory rule of navigation; (2) that such regulations, though they were expressly directed only to the master and navigating officers and though a penalty as against such officers, and not against the owner was provided for, enlarged the civil liability of the owner by visiting on it the penalty of *The Pennsylvania* rule (see to the contrary, semble, *Warshauer* v. *Lloyd Sabaudo S/A*, 71 F. (2d) 146); (3) that the effect of the regulations was to require the entry in the compass book of *all* observations, whether reliable or not, misleading or otherwise, and to deprive the officers of any discretion in the matter; (4) and that the rule of *The Pennsylvania* would be applicable in our courts although such a rule is not in force in Canada where the stranding occurred and there was no proof that such a rule exists under Norwegian law.

This leaves petitioners little to complain of except the adverse finding of fact.

POINT II.

The courts below neither "abandoned" nor qualified *The Pennsylvania* rule.

The rule of *The Pennsylvania* has been frequently applied and reaffirmed by the Circuit Court of Appeals of this Circuit. Some of the more recent decisions are as follows: *The Esperanza*, 16 F. (2d) 945, 946; *The Mabel*, 35 F. (2d) 731, 732; *Marshall Field & Co.* v. *U. S.*, 48 F. (2d) 763, 766; *The Fulton*, 54 F. (2d) 467, 469; *The New York*

Marine No. 10—The C. F. Coughlin, 109 F. (2d) 564, 566; *Henri DuBois Sons Co.* v. *A/S Ivarans Rederi*, 116 F. (2d) 492, 493.

The District Court made no comment on the rule itself but, assuming that the Norwegian decrees or regulations required an application of the rule, held that the respondents had proved that the alleged breach of the regulations had not caused or contributed to the stranding.

The Circuit Court of Appeals in affirming commented on the rule not because the respondents' proof fell short of showing that no breach of the decrees could have contributed to the stranding but because there was some question as to whether the rule was one of procedure or of substantive law. In the latter case our courts could not apply it as the *lex loci delicti* was the law of Canada which did not recognize the rule.

The petitioners contended below that the rule was one merely of evidence (1450) and should therefore be enforced in our courts. The Circuit Court of Appeals did not find it necessary to reach any conclusion as to this point as it found that in any event the alleged non-compliance with the regulations could not have caused the stranding.

The remark of the court (1450) that "the history of its application shows that it has done no more than shift the burden of proof with regard to causalty" is merely what it purports to be, a statement as to the "history of the application" of the rule and as such it has not been questioned by the petitioners.

If there is any distinction between a requirement that the violator of a statute shall prove a negative with respect to causation and a requirement that it shall prove that the violation could not have caused

the loss, the Circuit Court of Appeals did not commit itself to either alternative nor did the state of the proof require it to do so.

The petitioners further contend that the Courts below substituted their judgment for the requirement of the statute and thereby impaired the rule when they considered the adequacy of the ship's deviation records, the evidence bearing on the master's confidence in his compass courses and his knowledge of compass performance. The petition and brief are studded with statements such as that the court "accepted the captain's opinion against the requirements of the statute", "substituted their own judgment for that of the law making power", and held that "the master's information with respect to the compass was adequate although not what the statute required".

One of the petitioners' principal contentions in the courts below was that the vessel was in fact unseaworthy. Of course the courts were entitled to consider any evidence bearing on that issue.

But as respects the application of *The Pennsylvania* rule these findings were highly material. Since the vessel, while under way went where the latest applicable entries in the compass book indicated she would go, the petitioners fell back on the contention that other alleged deficiencies in the compass book might have contributed to the stranding by undermining the master's confidence in his compass performance and so opened his mind to ready acceptance of the radio bearings (Op. C. C. A. 1448).

This raised directly the question of the captain's state of mind with respect to his compasses and their performance as well as the adequacy of his records for dead reckoning on the courses which he pursued.

The Circuit Court of Appeals said:

> "This argument puts directly into issue the captain's state of mind—his belief in the accuracy of the compass and the sufficiency of the compass data, as well as the fact of the accuracy of the one and the sufficiency of the other. The captain himself testified that the 'Aakre's' compass was the best he had ever used, and that the compass data were 'sufficient for safe navigation'; and the trial court accepted this testimony not only as true in fact, but also as a true statement of what the captain had always believed. This is a complete answer unless other facts are shown which make the captain's faith absolutely incredible" (p. 1448).

The court did not substitute its judgment or that of the master for that of the Norwegian law maker; the breach of the regulations was assumed; the findings which, the petitioners say, are an impairment or abandonment of *The Pennsylvania* rule were simply by way of inquiry into the theory of causation which the petitioners themselves had suggested.

POINT III.

The petitioners' suggestion of a causal relation between non-compliance with the Norwegian regulation and the stranding is fantastic.

When the vessel resumed her course at 2:50 A. M., the evidence establishes that the master considered that dead reckoning, however accurate the compass, was no longer a factor of weight in determining his position (278, 289, 293, 299, 867, 877, fols. 3048, 3049).

Apart from that, there is no connection between

the compass book and the master's error since the appropriate entries in the compass book indicated the actual deviation.

If, however, the book had contained no such entries the compass records could have had no connection with the stranding on the theory that the master in accepting the radio bearings accounted for his position by a possible deviation of the compass.

Since the error in the laying down of the bearing received at 2:30 was about 20° and the vessel had pursued a steady course from St. John up to the time of the breakdown her position on the line of the bearing could not be accounted for by deviation of the compass except by assuming approximately a 20° deviation. Of the more than 1000 entries in the logs of courses used in the various watches for nineteen months before the stranding and checked by daily observations only three exceed 3° and only one exceeds 4°, all on Northerly courses. The average of all such log entries as to deviation either way, even disregarding plus or minus signs was less than 1°.

The courts below, therefore, did not err in finding that the master was telling the truth when he said that neither compasses nor deviation had anything to do with the errors of navigation which he made based on the radio bearings (230).

The petitioners' suggestion that the rule of *The Pennsylvania* can be invoked because the master set the course from St. John without allowing for a 3° easterly deviation is answered in the findings of the courts below that the compass book contained the appropriate data apprising the master of this deviation.

But if every entry of deviation observations had been made in the compass book which the petitioners

claim should have been made, and such additional earlier entries had any influence with the master their tendency would have been, not to apprise him of a 3° deviation but to induce him to believe there was no appreciable deviation. Most of the log entries for the course of south 50° west and related courses 5° either way, as well as for all the courses in the southeast and southwest quadrants show deviations of less than 3° or no deviation. None show a deviation of more than 3°. The average of all the entries in the log with respect to deviations on courses in the above mentioned 10° segment is only about 17/24th of a degree. In so far, therefore, as a complete record in the compass book of all observations as to deviation on these courses or any courses in the southwest quadrant could have influenced the master they must have influenced him in the direction of the decision which he actually made, while on the other hand the entries actually made in the compass book taken alone would indicate the 3° easterly deviation which the Court fixed as the maximum.

The master's setting a course without making allowance for deviation was not in itself a breach of the Norwegian regulations. The petitioners do not even suggest a possible causal connection between the master's decision and any breach of these regulations. They claim that the nonallowance of a 3° deviation may have contributed to the accident, but they never complete the necessary syllogism, the reason, of course, being that the only possible effect of a literal compliance with the regulations must have been in the direction of making the captain act precisely as he did.

POINT IV.

The Dissenting Opinion.

Judge Frank despite his remarks as to *The Pennsylvania* rule seems to have dissented from the majority opinion, as finally recorded, wholly on a question of fact.

The District Court and the majority in the Circuit Court of Appeals held that no violation of the Norwegian decrees could have caused or contributed to the stranding. Judge Frank's dissent, therefore, is based entirely on his view that the proof failed to establish that the alleged breach of the regulations could not have caused or contributed to the stranding.

He attached importance to the testimony in the record showing that on certain previous occasions during the year and a half preceding the accident there were discrepancies between the position of the vessel by observation and her position by dead reckoning.

It seems quite plain that Judge Frank misunderstood the purpose for which this testimony was offered in the court below and that he erred, as a matter of navigation, in giving it any weight.

The libellants offered the evidence above referred to in the District Court as bearing on the intrinsic infirmity of the compasses and relied on it in the Circuit Court of Appeals as showing the incompetency of the navigators and therefore the unseaworthiness of the vessel. It was never claimed that these discrepancies indicated or were the results of any failure to make entries of deviations in the compass book. The discrepancies were sometimes one way and sometimes the other and sometimes in the direction of the

vessel's course and had no connection or correspondence whatever with the compass deviations observed and noted in the log.

This evidence was appraised both in the District Court and the Circuit Court of Appeals. Judge Woolsey said:

> "It does not seem to me that in view of the compass records, the evidence of disparity between the dead reckoning and the observed position in the year and a half preceding the accident would indicate any intrinsic infirmity in the compasses. There are too many unascertainable variables to consider in connection with such disparities, as, for example, that the vessel may have been poorly steered, that the observations of the officers may have been inaccurate and that the judgment of the master as to current and drift may have been at fault" (p. 1384).

The Circuit Court of Appeals in considering the same evidence said:

> "Appellants recite at great length a list taken from the 'Aakre's' logbook of discrepancies between dead-reckoned and observed positions on previous voyages as evidence of inaccurate navigation. Most such discrepancies are no greater than are reasonably to be explained by the incalculable effects of tide, currents, and wind. To some extent they might be attributable to poor steering or inaccurate observation. But the greatest discrepancies shown are all largely along the line of the ship's course, not transverse to it, and to that extent not relevant to the performance or reading of the compass" (p. 1449).

Judge Frank did not vote for reversal of the decision of Judge Woolsey but merely for remand for the purpose of making further findings, his chief interest apparently being in this testimony (1456) which was dismissed by both courts as having no probative value.

POINT V.

The Petition should be denied.

Respectfully submitted,

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Proctor for Lamport & Holt Line, Ltd.

JOHN L. GALEY,
Of Counsel.

New York, Nov. 21, 1941.